STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 3, 2000
v	No. 210014 Wayne Circuit Court
TODD DESHAWN DANIELS, Defendant-Appellant.	Criminal Division LC No. 96-008523

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of second-degree murder, MCL 750.317; MSA 28.549, and seven counts of assault with intent to commit murder, MCL 750.83; MSA 28.278. The trial court sentenced defendant to concurrent prison terms of twenty to forty years each for the second-degree murder convictions and five to ten years each for the assault convictions. Defendant appeals as of right. We affirm.

This case arises out of the burning of a private residence in the City of Detroit, in October 1996. At codefendant Paula Bailey's instigation, defendant and codefendant Eugene McKinney intentionally set fire to a house in which Bailey's ex-boyfriend and several others lived. Three children were killed in the fire. Seven others, three adults and four other children, escaped from the fire by jumping from a second-story window.

I

Defendant first claims that his statement to police, in which he admitted helping codefendant McKinney set fire to the residence, was inadmissible because it was the product of an unlawful, warrantless arrest. A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); MSA 28.874(c); *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). In reviewing a challenged finding of probable cause, this Court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual committed the felony. *Kelly, supra* at 631-632. A confession

that results from an illegal arrest is inadmissible. *People v Richardson*, 204 Mich App 71, 78; 514 NW2d 503 (1994).

After carefully reviewing the record, we conclude that the information known by the police prior to defendant's arrest was sufficient to justify a fair-minded person of average intelligence in believing that defendant assisted codefendant McKinney in setting fire to the occupied dwelling on Belvedere Street. Prior to defendant's arrest, the police interviewed several people, including defendant's codefendants, who implicated defendant in this crime.[1] Therefore, the police had probable cause to arrest defendant and his statement to police was admissible at trial.

II

Defendant also argues that his confession was involuntary. Defendant admits, however, that he did not challenge the voluntariness of his confession below and that this claim was not pursued at the suppression hearing. Thus, a factual record supporting defendant's claim was never developed. Under these circumstances, this issue has been abandoned by defendant.[2] See *People v Howard*, 226 Mich App 528, 537; 575 NW2d 16 (1997).

III

Next, defendant argues that the evidence was insufficient to support his convictions of second-degree murder and assault with intent to murder under an aiding and abetting theory because there was insufficient evidence to establish that he shared the principal's intent. To be convicted as an aider and abettor, a defendant must either intend the commission of the crime or participate in the crime while knowing that his principal intended the commission of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Viewing the evidence in the light most favorable to the prosecution, *id.* at 757, we believe the evidence was sufficient to indicate that defendant aided and encouraged codefendant McKinney in setting fire to the Belvedere residence while knowing that codefendant

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[1] The police had evidence that defendant was seen at a party with his codefendants on the night of the fire; that he went with them to see the house on Belvedere Street where codefendant Paula Bailey's ex-boyfriend resided and that Bailey indicated that she wanted him "taken care of"; and that the four returned to the party, and later defendant left the party with codefendant McKinney one or two hours before the house burned down.

[2] The only evidence admitted at the suppression hearing would support a finding that defendant's statement was voluntary. Sergeant Arlie Lovier testified that defendant (1) was coherent and responsive during the interview; (2) did not appear to be drunk or high; (3) had a 12th grade education and appeared to understand his constitutional rights and voluntarily waive those rights; (4) did not ask for food or water prior to the interview; and (5) was not threatened prior to the interview or promised anything in exchange for his statement. Under these circumstances, defendant's confession was voluntarily made. See *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995).

McKinney possessed an intent to kill. Therefore, the evidence was sufficient to support defendant's convictions.

IV

Defendant further contends that the trial court erred in its instructions to the jury regarding aiding and abetting and arson. Defendant waived review of the jury instructions by failing to object at trial. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *Carines, supra* at 761-764, 774. A "reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 774. In this case, manifest injustice will not result from our failure to review this issue because the challenged instructions, as a whole, adequately conveyed to the jury the concept of aiding and abetting and the intent required to convict defendant as an aider and abettor, as well as the intent required to commit arson.[3]

V

Defendant next contends that he was denied a fair trial by two instances of allegedly improper conduct on the part of the prosecutor. As he admits, however, defendant did not object at trial to the conduct of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant first claims that the prosecutor made an improper civic duty appeal to the jury through a Detroit Free Press article concerning an unrelated firebombing case in which the prosecutor made general statements about vengeance arson. "[P]rosecutor's should not resort to civil duty arguments that appeal to the fears and prejudices of jury members." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor's remarks were not made to the jury during closing argument. The remarks were contained in a newspaper article about an unrelated fire. The jury was repeatedly instructed not to read anything in the newspaper about this case; therefore, there is no indication that the jury was even aware of the prosecutor's remarks. Moreover, assuming the jury saw the article, defense counsel admitted that the tenor of the article was not that the community should take some action to prevent revenge arsons, just that jurors might get that impression from the article. Even assuming the remarks made by the prosecutor could be construed as a call to the jury to do its civic duty to stop revenge arsons, any undue prejudice could have easily been cured by a cautionary instruction. See *People v Cooper*, 236 Mich App 643, 651-652; 601 NW2d 409 (1999).

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[3] We note that our Supreme Court recently noted that CJI2d 31.2, which states that a defendant must have "intended to set a fire, knowing that this would cause injury or damage to another person or to property," inaccurately reflects Michigan law regarding common-law arson, which is a general intent crime ("The wilful and wanton commission of an act that creates a very high risk of burning a dwelling house is an alternative method of proving malice."). *People v Nowack*, ___ Mich ___. ___; 614 NW2d 78 (Docket No. 113405, issued 7/11/00), slip op p 11, 13-20.

In a related claim, defendant argues that the trial court abused its discretion in denying his motion for a mistrial because of the article. We disagree. As indicated above, there is no indication in the record that the jury even saw the newspaper article. Therefore, there is nothing to indicate that defendant was prejudiced by it. Since no prejudice has been shown by defendant, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Defendant also claims that the prosecutor made improper remarks that appealed to the jury's sympathy during closing argument. It is improper for the prosecutor to appeal to the jury to sympathize with the victim of a crime. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). In this case, the allegedly inappropriate remarks, taken in context, were made by the prosecutor as he was summarizing the evidence presented against defendant at trial. As he admits, defendant did not object to these remarks. Therefore, even if the remarks were improper in that they had a tendency to appeal to the sympathy of the jury, any undue prejudice could have been cured by a cautionary instruction. See *id*. at 372-373. Moreover, during jury instructions, the trial court repeatedly instructed the jury that it must decide the case based on the evidence presented and not allow sympathy or prejudice to influence their decision. Thus, any impropriety was cured by the jury instructions and, therefore, the allegedly inappropriate remarks did not result in a miscarriage of justice. See *Cooper*, *supra* at 652.

VI

Next, defendant claims that the trial court erred in, sua sponte and without justification or cause, removing his former trial attorney and appointing a new attorney approximately six months before the commencement of trial. After adversary judicial proceedings have been initiated, a trial court's removal of a criminal defendant's appointed counsel for any reason other than gross incompetence, physical incapacity, or contumacious conduct violates the defendant's constitutional right to counsel. See *People v Johnson*, 215 Mich App 658, 663, 665-666; 547 NW2d 65 (1996). However, the record reveals that defendant acquiesced in his representation by the new attorney. A defendant may not acquiesce to counsel's representation and then claim error on appeal. See *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1995). In any event, from the record presented to this Court, it appears that the prior counsel's conduct was grossly incompetent and/or contumacious. Therefore, the trial court had proper grounds for removing defendant's counsel. *Johnson*, *supra* at 663.

VII

Defendant also claims that the trial court erred in allowing the hearsay statement of defendant's co-conspirator to be introduced at trial before there was independent proof of the conspiracy. However, we hold that the existence of an agreement was sufficiently established before codefendant McKinney's statements were introduced. See *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982).

VIII

Defendant further asserts that he was denied the effective assistance of counsel. Because defendant did not request a *Ginther*[4] hearing, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). After carefully reviewing the record, we find that defendant has not sustained his burden of proving ineffective assistance of counsel. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant has failed to show that his counsel's performance fell below an objective standard of reasonableness or that the representation so prejudiced him that it deprived him of a fair trial. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

IX

Lastly, defendant claims that he was denied due process and a fair trial because of the cumulative effect of several alleged errors. However, we have concluded that no prejudicial errors occurred at trial; thus, we reject the argument that the cumulative effect of the errors requires reversal. See *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White

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[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).